OCEAN BREEZE EXPORT, INC. v. RIALTO DISTRIBUTING, INC.
PACA Docket No. R-00-0113.
Decision and Order.
Filed October 1, 2001.

F.O.B., terms assumed – Burden of proof, accepted goods

In an international shipment of grapes to Venezuela, the seller sought to prove that the contract terms were f.o.b. acceptance final, and the buyer sought to prove that the terms were f.o.b. Neither party succeeded in proving its allegations, and it was therefore assumed that the terms were f.o.b. It was also found that where goods are accepted the burden of proving a breach of contract, and resulting damages, falls upon the buyer.

George S. Whitten, Presiding Officer.
Pro se, Complainant.
Pro se, Respondent.
Decision and Order issued by William G. Jenson, Judicial Officer.

Preliminary Statement

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*). A timely complaint was filed in which Complainant seeks an award of reparation in the amount of $15,843.70 in connection with a transaction in foreign commerce involving table grapes.

Copies of the Report of Investigation prepared by the Department were served upon the parties. A copy of the formal complaint was served upon Respondent which filed an answer thereto denying liability to Complainant.

The amount claimed in the formal complaint does not exceed $30,000.00, and therefore the documentary procedure provided in the Rules of Practice (7 C.F.R. § 47.20) is applicable. Pursuant to this procedure, the verified pleadings of the parties are considered a part of the evidence in the case as is the Department's report of investigation. In addition, the parties were given an opportunity to file evidence in the form of sworn statements. Complainant filed an opening statement, and Respondent filed an answering statement. Complainant did not file a statement in reply. Complainant filed a brief.

Findings of Fact

1. Complainant, Ocean Breeze Export, Inc., is a corporation whose address 1342 Rocky Hill Drive, Exeter, California.

2. Respondent, Rialto Distributing, Inc., is a corporation whose address is P. O. Box 14119, Pinedale, California. At the time of the transaction involved herein Respondent was licensed under the Act.

3. On or about November 18, 1998, Complainant agreed to sell to Respondent 2,435 containers of Red Globe grapes at $9.50 per container f.o.b.

4. On November 23, 1998, Complainant, at Respondent's direction, shipped 1,646 containers of the grapes to Respondent's customer in Venezuela. Complainant invoiced Respondent on December 11, 1998, for the 1,646 cartons, and the invoice included charges for a temperature recorder at $23.50, a phytosanitary certificate at $32.00, a USDA inspection at $64.20, Fedex overnight mail at $15.00, and SO2 gas at $72.00, for a total amount of $15,843.70.

5. The grapes arrived in Venezuela on December 8, 1998, and were inspected on that date by an agency of the Venezuelan government. Respondent provided a translation of the inspection which reads as follows:

> The date of December 8, 1998 in agreement with the bill of lading BL#EISU415800259001, through Evergreen shipping lines it was realized, on the inspection No. 26690 of containers EMCU5163369, sent by the shipper identified as Rialto Dist., Inc. PO Box 14119, Pinedale, CA USA 93650, and consigned to Brinceno, Uribe, & Ojeda at Mercado Mayorista de Valencia, Venezuela. It was observed, that there were general damages observed in 60% and of ripening of the product variety grapes, red globe label Ocean Breeze, packed in 19lbs styro for a total of 1646 cnts in the load.

The 60% general damage included rot and fungus; Temperature control of the Container EMCU5163369 posted at set point 1.05 c at the moment of arrival at the port of port Cabello, Venezuela. In Valencia, Venezuela on the 11th day of the month of December in the year 1998.

6. Respondent notified Complainant of a breach of contract on December 9, 1998.

7. Respondent has not paid Complainant any part of the purchase price of the grapes.

8. The informal complaint was filed on February 8, 1999, which was within nine months after the cause of action herein accrued.

[Numbers 5,6, & 7 renumbered to 6,7, & 8, respt.. – Editor]

Conclusions

Complainant, by this reparation action, seeks to recover the purchase price of a container of table grapes sold to Respondent, and shipped to Venezuela. Complainant asserts that the sale was on an f. o. b. acceptance final basis. In support of this contention Complainant's president, Richard Bennett, asserts in the informal complaint, and the sworn formal complaint, that the grapes were purchased by David Sabovich on behalf of Respondent and sold by Les Davis, salesman, on behalf of Complainant. Mr. Bennett states further that these persons agreed at the time of the sale to f.o.b. acceptance final terms. However, Complainant nowhere submitted a statement by Les Davis, the person with direct knowledge of the

contract terms. Respondent, in the answer sworn to by its president, Mike Vukovich, asserts that the terms of sale were not f.o.b. acceptance final, but were simply f.o.b. However, even though Respondent admitted that the contract was negotiated on its behalf by David Sabovich, Respondent also failed to submit a statement by Mr. Sabovich. Complainant also points to its invoice for the load which states under the heading "TERMS": "Net 14 Days / FOB Accept". The word "Accept" is at the edge of the page and gives the impression that the remainder of the phrase was intended to be present. However, the invoice was issued on December 11, 1998, or eighteen days after shipment, and two days after notice of the breach was given by Respondent. Complainant had the burden of proving that the terms of the contract were f.o.b. acceptance final, and we conclude that it has not met that burden.[1] While Respondent, as the proponent of the proposition that contract terms were f.o.b., failed to offer a statement by Mr. Sabovich, we nevertheless find that the applicable terms were f.o.b. We reach this conclusion because f.o.b. terms are assumed where no contract terms are mentioned,[2] and it is reasonable that the same rule should apply where no contract terms are proven.

The Regulations,[3] in relevant part, define f.o.b. as meaning "that the produce quoted or sold is to be placed free on board the boat, car, or other agency of the through land transportation at shipping point, in suitable shipping condition . . ., and that the buyer assumes all risk of damage and delay in transit not caused by the seller irrespective of how the shipment is billed." Suitable shipping condition is defined,[4] in relevant part, as meaning, "that the commodity, at time of billing, is in a condition which, if the shipment is handled under normal transportation service and conditions, will assure delivery without abnormal deterioration at the contract destination agreed upon between the parties." [5]

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[1] *See La Casita Farms, Inc. v. Johnson City Produce Co.*, 34 Agric. Dec. 506 (1975).

[2] *See Hunts Point Tomato Co., Inc. v. S & K Farms, Inc.*, 42 Agric. Dec. 1224, at 1225, (1983). See also UCC § 2-503, Comment 5, and J. White & R. Summers, *Handbook of the Law Under the Uniform Commercial Code,* § 5-2, p. 143 (1972).

[3] 7 C.F.R. § 46.43(i).

[4] 7 C.F.R. § 46.43(j).

[5] The suitable shipping condition provisions of the Regulations (7 C.F.R. § 46.43(j)) which require delivery to contract destination "without *abnormal* deterioration," or what is elsewhere called "good delivery" (7 C.F.R. § 46.44), are based upon case law predating the adoption of the Regulations. See Williston, *Sales* § 245 (rev. ed. 1948). Under the rule it is not enough that a commodity sold f.o.b., U.S. No. 1, actually be U.S. No. 1 at time of shipment. It must also be in such a condition at the time of shipment that it will make good delivery at contract destination. It is , of course, possible for a commodity that grades U.S. No. 1 at time of shipment, and is shipped under normal transportation

Respondent accepted the grapes on arrival at destination in Venezuela, and thus became liable for the full contract price of the load less any damages resulting from any breach of contract on the part of Complainant. The burden of proving a breach and resulting damages rests upon Respondent.[6] Respondent asserts that the Venezuelan inspection proves that there was a breach of the contract. However, the translation of that inspection provided by Respondent gives a very unsatisfactory statement as to the damage present in the grapes. The inspection states: "It was observed, that there were general damages observed in 60% and of ripening of the product variety grapes, . . ." This does not state the nature of the damage present in the grapes, unless it is intended to classify the damage as "ripening." However, ripening is not a recognized condition or grade factor under the United States Standards for Grades of Table Grapes,[7] and we know of no damage or grade factor with which it could be associated. The Venezuelan inspection also states that "[t]he 60% general damage included rot and fungus." However, since there is no statement as to the percentage of rot and fungus contained within the 60% general damages we have no way of knowing that the percentage exceeded what would be allowed under the suitable shipping condition warranty. We conclude that the inspection

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service and conditions, to fail to make good delivery at destination due to age or other inherent defects which were not present, or were not present in sufficient degree to be cognizable by the federal inspector, at shipping point. Conversely, since the inherently perishable nature of commodities subject to the Act dictates that a commodity cannot remain forever in the same condition, the application of the good delivery concept requires that we allow for a "normal" amount of deterioration. This means that it is entirely possible for a commodity sold f.o.b. under a U.S. grade description to fail, at destination, to meet the published tolerances of that grade, and thus fail to grade at destination, and nevertheless make good delivery. This is true because under the f.o.b. terms the grade description applies only at shipping point and the applicable warranty is only that the commodity thus sold will reach contract destination without abnormal deterioration, not that it will meet the grade description at destination. If the latter result is desired then the parties should effect a delivered sale rather than an f.o.b. sale. *See Pinnacle Produce, Ltd. v. Produce Products, Inc.*, 46 Agric. Dec. 1155 (1987); *G & S Produce v. Morris Produce,* 31 Agric. Dec. 1167 (1972); *Lake Fruit Co. v. Jackson*, 18 Agric. Dec. 140 (1959); and *Haines Assn. v. Robinson & Gentile,* 10 Agric. Dec. 968 (1951). For all commodities other than lettuce (for which specific good delivery standards have been promulgated) what is "normal" or abnormal deterioration is judicially determined. *See Harvest Fresh Produce Inc. v. Clark-Ehre Produce Co.*, 39 Agric. Dec. 703 (1980).

[6] See UCC 2-607(4). *See also The Grower-Shipper Potato Co. v. Southwestern Produce Co.,* 28 Agric. Dec. 511 (1969).

[7] The United States Standards for Grades of Table Grapes (European or Vinifera Type), §51.880, published by the United States Department of Agriculture, Agricultural Marketing Service, Fruit and Vegetable Division, Fresh Products Branch, and available in printed form from that source, or on the Internet at http://www.ams.usda.gov/standards/stanfrfv.htm.

does not prove a breach of warranty.

Even if the inspection had shown condition problems in the grapes that exceeded what would be allowed under the suitable shipping condition warranty, Respondent would still have failed to prove a breach of that warranty. This is true because the warranty is applicable only if "the shipment is handled under normal transportation services and conditions."[8] The burden of proving that transportation services and conditions were normal falls upon the buyer where a shipment is accepted.[9] In this case the inspection only states that "[t]emperature control of the Container EMCU5163369 posted at set point 1.05 c at the moment of arrival at the port of Cabello, Venezuela." A statement of the setting of the temperature control is not nearly as important as a certification of the pulp temperature of the grapes. Apparently no pulp temperatures were taken by the Venezuelan inspector. This could have been overcome by Respondent if there had been an adequate temperature recorder on board the shipment. However, for some reason only an eight day recorder was placed on board. The tape from this recorder showed good temperatures during the first eight days of transit, but this leaves us without any indication as to the temperatures at which the grapes were held during the remaining seven days of transit. We conclude that Respondent failed to show that transportation services and conditions were normal, and for this additional reason has failed to show a breach of contract on the part of Complainant.

Since Respondent accepted the grapes it became liable to Complainant for the full purchase price of $15,843.70. Respondent's failure to pay Complainant this amount is a violation of section 2 of the Act.

Section 5(a) of the Act requires that we award to the person or persons injured by a violation of section 2 of the Act "the full amount of damages sustained in consequence of such violations." Such damages include interest.[10] Since the Secretary is charged with the duty of awarding damages, he also has the duty, where appropriate, to award interest at a reasonable rate as a part of each reparation

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[8] 7 C.F.R §46.43(j).

[9] *Mecca Farms, Inc. v. Bianchi Pre-Pack, Inc.,* 50 Agric. Dec. 1929 (1991); *O.P. Murphy Co., Inc. a/t/a Murphy & Sons v. Kelvin S. Ng d/b/a Ken Yip Co.,* 41 Agric. Dec. 772 (1982); *Dave Walsh v. Rozak's*, 39 Agric. Dec. 281 (1980).

[10] *L & N Railroad Co. v. Sloss Sheffield Steel & Iron Co.*, 269 U.S. 217 (1925); *L & N Railroad Co. v. Ohio Valley Tie Co.,* 242 U.S. 288 (1916).

award.[11] We have determined that a reasonable rate is 10 percent per annum.

Complainant was required to pay a $300.00 handling fee to file its formal complaint. Pursuant to 7 U.S.C. 499(e)(a), the party found to have violated Section 2 of the Act is liable for any handling fees paid by the injured party.

Order

Within 30 days from the date of this order respondent shall pay to complainant, as reparation, $15,843.70, with interest thereon at the rate of 10% per annum from January 1, 1999, until paid, plus the amount of $300.

Copies of this order shall be served upon the parties.

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[11] *See Pearl Grange Fruit Exchange, Inc. v. Mark Bernstein Company, Inc.,* 29 Agric. Dec. 978 (1970); *John W. Scherer v. Manhattan Pickle Co.,* 29 Agric. Dec. 335 (1970); and *W. D. Crockett v. Producers Marketing Association, Inc.,* 22 Agric. Dec. 66 (1963).